

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 Brian Borenstein,

5 Plaintiff

6 v.

7 The Animal Foundation, et al.,

8 Defendants

Case No. 2:19-cv-00985-CDS-NJK

Order Granting Defendant Clark County's
Motion for Summary Judgment and
Granting Defendant TAF's Motion for
Partial Summary Judgment

[ECF Nos. 428, 455, 459, 468, 477, 479]

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10 This is a civil rights disability discrimination, property, and personal injury case. Plaintiff
11 Brian Borenstein filed a third-amended complaint (TAC) on July 5, 2023. TAC, ECF No. 329.
12 Pending before the court are defendant Clark County's motion for summary judgment (ECF No.
13 428 (sealed), ECF No. 455 (unsealed)), and defendant The Animal Foundation's (TAF) motion
14 for partial summary judgment (ECF No. 477 (unsealed), ECF No. 479 (sealed)).¹ For the reasons
15 herein, I grant both motions.

16 **I. Background**

17 With over four years of motion practice, the parties are familiar with the facts of this
18 case, so I only include here the information relevant to resolving the pending motions. On May
19 23, 2024, I granted Clark County's motion to dismiss the TAC (ECF No. 342) and found that the
20 only claim that remained was Borenstein's ninth cause of action: unlawful discrimination in
21 violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203. *See* Order, ECF No.
22 423, ECF No. 329 at ¶¶ 316–26. Clark County now moves for summary judgment on this sole
23 claim. Mot. for summ. j, ECF No. 455.

24
25 ¹ Also pending is TAF's motion for summary judgment at ECF No. 459. This motion was to be stricken in
26 a prior order. *See* Order, ECF No. 473. Due to the court's error, this motion was not actually stricken.
Directions to strike this motion in accordance with my prior order are set forth at the conclusion of this
order. Additionally pending before the court is Borenstein's motion to seal. ECF No. 468. Finding good
cause and compelling reasons, Borenstein's motion to seal is granted.

1 In that same order, I granted in part TAF's motion to dismiss the TAC (ECF No. 343),
 2 allowing the following claims to survive: (1) unreasonable seizure (fourth cause of action); (2)
 3 unlawful discrimination in violation of the ADA (eighth and ninth causes of action); (3)
 4 unlawful deprivation of, interference with, and punishment for exercising rights and privileges
 5 in violation of Nev. Rev. Stat. § 651.070 *et seq.* (eleventh cause of action); and (4) negligent
 6 training, supervision, and retention (thirteenth cause of action). ECF No. 423 at 21. TAF then
 7 filed a motion for summary judgment on these claims. Mot for summ. j., ECF No. 432. However,
 8 in my October 22, 2024 order, I noted that TAF's motion was filed after the deadline for
 9 dispositive motions and was thus untimely. Order, ECF No. 454 at 6. I denied TAF's motion for
 10 summary judgment, and pursuant to Rule 56, I directed TAF to refile its motion addressing only
 11 the unreasonable seizure claim and the negligent training, supervision, and retention claim. *Id.*
 12 TAF filed its motion for partial summary judgment on December 5, 2024. Mot. for partial summ.
 13 j., ECF No. 477.²

14 II. Legal standard

15 Summary judgment is appropriate when the pleadings and admissible evidence “show
 16 that there is no genuine issue as to any material fact and that the movant is entitled to judgment
 17 as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)).
 18 At the summary-judgment stage, the court views all facts and draws all inferences in the light
 19 most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100,
 20 1103 (9th Cir. 1986). If reasonable minds could differ on material facts, summary judgment is
 21 inappropriate because its purpose is to avoid unnecessary trials when the facts are undisputed;
 22 the case must then proceed to the trier of fact. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
 23 1995); *see also Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Once the
 24 moving party satisfies Rule 56 by demonstrating the absence of any genuine issue of material
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² This motion is fully briefed. *See* Opp'n, ECF No. 488; Reply, ECF No. 489.

1 fact, the burden shifts to the party resisting summary judgment to “set forth specific facts
2 showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256
3 (1986); *Celotex*, 477 U.S. at 323. “To defeat summary judgment, the nonmoving party must
4 produce evidence of a genuine dispute of material fact that could satisfy its burden at trial.”
5 *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018).

6 III. Discussion

7 A. Clark County’s motion for summary judgment is granted.

8 Borenstein alleges that Clark County engaged in “unlawful retaliation in violation of the
9 [ADA]” when it allowed TAF to place a warning in its electronic files—accessible by Clark
10 County Animal Control and other shelters and rescue organizations—that Borenstein should
11 not be permitted to adopt an animal. ECF No. 329 at ¶ 321. In its motion for summary judgment,
12 Clark County argues (1) it cannot be held liable for TAF’s alleged retaliatory acts; and (2) the
13 retaliation claim fails because there is no underlying unlawful act or practice by Clark County.
14 ECF No. 455 at 16–17.

15 First, Clark County argues that it cannot be held liable for TAF’s alleged retaliatory acts
16 because “[t]here is no basis to hold a government entity liable for the (alleged) retaliatory acts of
17 its contractor under 42 U.S. Code § 12203.” *Id.* at 16. Clark County further states that it has no
18 control over TAF’s adoption services and therefore has no control over TAF’s decision whether
19 to adopt to a particular individual. *Id.* To support this argument, Clark County points to the
20 Shelter Agreement between Clark County and TAF that does not mention adoption services, as
21 well as three witnesses who stated that the adoption services provided by TAF were separate
22 from the shelter service that TAF provides to the County. *Id.* at 17. Because there is no evidence
23 that Clark County had any involvement in TAF’s decision to place a notice in Borenstein’s
24 electronic file, the County surmises that it cannot be held liable for acts it did not know about
25 and in which it did not participate. *Id.*

1 In his opposition, Borenstein argues that the specific contours of the Shelter Agreement
 2 are irrelevant as to whether TAF engaged in unlawful retaliation, which was “indisputably
 3 rooted in its agency relationship with the County.” Opp’n, ECF No. 482 at 3. He explains that it
 4 is the “unchecked defamatory statements” made by TAF via the warning note placed in the
 5 electronic system³ in retaliation for Borenstein’s ADA protected conduct that gives rise to the
 6 County’s liability, and not “whether the County contracts with TAF to provide the very service
 7 [] denied to Mr. Borenstein by . . . TAF[.]” *Id.* Borenstein also argues that the Ninth Circuit has
 8 foreclosed the argument that state defendants cannot be held liable for ADA violations
 9 committed by their contractors. *Id.* at 3–4 (citing *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir.
 10 2013)).

11 Under Title II of the ADA, “no qualified individual with a disability shall, by reason of
 12 such disability, be excluded from participation in or be denied the benefits of the services,
 13 programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
 14 42 U.S.C. § 12132. In *Castle*, the Ninth Circuit made clear that Title II’s obligations apply to
 15 public entities regardless of how those entities chose to provide or operate their programs and
 16 benefits, which includes a decision to contract out its services. 731 F.3d at 910. *See Armstrong v.*
 17 *Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010) (“[A] public entity, in providing any aid,
 18 benefit, or service, may not, directly or through **contractual**, licensing, or other arrangements,
 19 discriminate against individuals with disabilities.”) (quoting 28 C.F.R. § 35.130(b)(1)) (emphasis
 20 added)). Therefore, Clark County incorrectly asserts it cannot be held liable for TAF’s alleged
 21 retaliation merely because TAF was a contractor.

22 This does not save Borenstein’s claim, however, because the facts indicate that Clark
 23 County contracted with TAF for its shelter services, **not** its adoption services. Indeed, a review
 24 of the Shelter Agreement between TAF and Clark County reveals there is not a single mention of
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 26

³ The name of the electronic database is “Chameleon.” ECF No. 482 at 7.

1 adoption services. *See* Shelter Agreement, Clark County's Ex. 1, ECF No. 428-4 (sealed); *see also*
2 TAF's Ex. B, ECF No. 477-2. Additionally, in his deposition, James Andersen, the Code
3 Enforcement Manager who oversees the Code Enforcement Division and Animal Protection
4 Services for Clark County, testified:

5 The County contract for shelter services is specific to The Animal Foundation's
6 agreement with the County for the period of time in which the animal is under our
7 legal hold days. Animal Foundation has two distinct operating entities: the
8 sheltering side and the nonprofit foundation side for adoptions. **The terms of this
contract do not extend to the adoption portion of The Animal Foundation.**
And so we do not -- the County -- tell them what to do.

9 Andersen dep., Clark County's Ex. E, ECF No. 428-5 at 6, 115:13–22 (sealed) (emphasis added);
10 TAF's Ex. P, ECF No. 477-16 at 5, 115:13–22. Additionally, Carly Scholten, TAF's former Chief
11 Operating Officer, who was in charge of adoptions, stated that the shelter admissions process
12 and the adoptions process did not interact or work together. *See* Scholten dep., Clark County's
13 Ex. F, ECF No. 428-6, 36:17–25 (sealed); TAF's Ex. S, ECF No. 477-19 at 7, 36:17–25. Borenstein
14 does not provide any facts that demonstrate that Clark County had any control—actual,
15 constructive, or otherwise—over TAF's adoption services.

16 Instead, Borenstein largely relies on the fact that TAF placed the warning note in his
17 electric file on Chameleon to support his argument that Clark County is responsible for TAF's
18 alleged violation of the ADA. *See* ECF No. 482 at 23 ("TAF placed the warning not to adopt an
19 animal to Mr. Borenstein in the government database, which Animal Control Dispatcher, Randy
20 Soltero, referred to as 'our system.'"). But the existence of the note on the government database
21 is insufficient to support the conclusion that Clark County therefore has control over what
22 notes TAF enters into the database for issues relating to its adoption services. In fact, the
23 evidence demonstrates the opposite. In his deposition, Andersen stated that TAF's adoption
24 services are not subject to its contract with Clark County, so Clark County does not tell TAF

1 what to do once an animal goes into TAF's legal custody. Andersen dep., Def.'s Ex. E, ECF No.
2 428-5 at 114:22–115:25 (sealed); Def.'s Ex. P, ECF No. 477-16 at 5, 114:22–115:25. This is because
3 TAF has “two separate operating entities: the sheltering side and the nonprofit foundation side
4 for adoptions.” *Id.* The terms of this contract do not extend to the adoption portion of TAF.

5 Lieutenant Zavala, a Clark County Animal Control lieutenant officer, provided similar
6 testimony. When asked if the County could provide a kind of process for a person to challenge
7 their placement on TAF's do-not-adopt list, Zavala said, “I don't see -- I don't see us stepping in
8 to -- to tell The Animal Foundation how their policies or -- or how to change their -- their
9 procedures for that.” Zavala dep., Pl.'s Ex. 5, ECF No. 445-5 at 78, 294:25–295:2.

10 Zavala also testified that Clark County does not even have access to TAF's adoption
11 notes. He testified “the do-not-adopt-to . . . information is really on the adoption side. It's not
12 something that's listed on any of our investigations. If we had a call for service, for whatever it is,
13 we work in the Chameleon system. We work in a different -- a different wing of it.” *Id.* at 76,
14 286:17–22. According to Zavala, “[t]he Animal Foundation notes details on why he's on that list.
15 That wouldn't be part of our records. [Borenstein] could request anything and everything with
16 his name on it from us, and there wouldn't be anything discussing [the note][.]” *Id.* at 286:23–
17 287:2. Because there are no facts to demonstrate that Clark County contracted with TAF for its
18 adoption services, Clark County's obligation to ensure that TAF complied with Title II extended
19 only to TAF's actions in relation to its shelter services. It did not have any obligation to ensure
20 TAF complied with Title II of the ADA as it relates to TAF's adoption services. *See Medina v.*
21 *Valdez*, 2011 WL 887553, at *5 (D. Idaho, Mar. 10, 2011) (“When a public entity contracts with a
22 private entity to provide a public service, the public entity must ensure by contract that the
23 private entity will **provide the service** in accordance with title II.”) (emphasis added).

1 Because Borenstein fails to identify any genuine issues of material fact as to whether
 2 Clark County contracted with TAF for its adoption services, Clark County cannot be held
 3 responsible for TAF's decision to put a do-not-adopt note in Borenstein's file. Clark County is
 4 therefore entitled to summary judgment on this claim.⁴

5 **B. TAF's motion for partial summary judgment is granted.**

6 Complying with this court's order, TAF filed another motion for summary judgment on
 7 two of Borenstein's claims: his § 1983 claim alleging an unreasonable seizure in violation of the
 8 Fourth Amendment and his negligent supervision, training, and retention claim. *See* ECF No.
 9 477. I address each claim in turn.

10 ***1. TAF is entitled to summary judgment on Borenstein's § 1983 claim.***

11 In his TAC, Borenstein alleges that TAF "unreasonably infring[ed] on [Borenstein's]
 12 possessory interests protected by the Fourth Amendment's prohibition on unreasonable
 13 seizures . . . by unlawfully converting that temporary, authorized deprivation of Borenstein's
 14 [dog] into a permanent, unlawful deprivation, through the adoption of [Borenstein's dog]." ECF
 15 No. 329 at ¶ 272. In its motion, TAF argues that it cannot be liable under the Fourth Amendment
 16 because it did not act under color of state law. ECF No. 477 at 14. TAF argues that

17 [a]lthough TAF's intake (also referred to as admissions) department works hand-
 18 in-hand with the County and its animal control officers, the County has no ability
 19 to control any aspect of TAF's business beyond the Clark County Ordinances and
 20 the Shelter Agreement, including TAF's KEPPT program, its animal clinic, and/or
 21 its adoption center. TAF's adoption-related services are similarly absent from the
 Shelter Agreement. Nowhere in the Shelter Agreement are terms governing how
 TAF must conduct its adoptions, to whom it may adopt, what animals it may adopt
 out, and/or under what circumstances it may not adopt any of the animals it owns.

22 *Id.* In opposition, Borenstein argues that

23 [i]t is incorrect that TAF's shelter services are separate and distinct from its
 24 Adoption Center and that the contract does not govern any of TAF's adoption-
 25 related services, as the contract specifically provides for the adoption of animals
 impounded by Animal Control. This is made clear in Article II of the agreement.

26 ⁴ Because I grant summary judgment on this claim for these reasons, I do not address the merits of Clark
 County's "unlawful act" argument.

TAF's inventory of animals available for adoption comes overwhelmingly through government impoundments; the County determines the legal hold on its impoundments, thereby controlling when and how TAF receives most of its adoption inventory (*i.e.* adoptive assets), including Mana, which inventory is subsequently comingled in the Adoption Center with other animal inventory received by other means (*e.g.* public walk-ins). TAF may not adopt any animal impounded by the County during the legal hold period and must provide humane and reasonably appropriate care and shelter during this time. Furthermore, ownership of such animals after the legal hold period may inure to TAF only if "TAF does not exceed the maximum shelter occupancy as provided by Section 2.5 [of the contract]." Shelter occupancy at the time TAF seized ownership of Mana is a fact genuinely in dispute in this case.

ECF No. 488 at 6–7 (underlining in original).

Borenstein brings a § 1983 claim against TAF. To maintain a § 1983 claim, Borenstein must show (1) the conduct complained of was committed by a person acting under the color of state law; and (2) the conduct deprived him of a constitutional right. *Baxter v. City of Hemet*, 728 F. Supp. 3d 1127, 1139 (C.D. Cal. 2024). Generally, private entities are not acting under color of state law. *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). Because TAF is a private entity, to demonstrate that it was acting under color of state law, Borenstein must show that there was significant state involvement in the action. *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997). There are four tests for determining whether a private individual's actions amount to state action: "(1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Id.* As it is not entirely clear what test Borenstein uses to argue that TAF is a state actor, I analyze the facts of this case under each test to determine whether a genuine issue of material fact exists as to whether TAF was acting under color of state law.

a. Public functions test

Under the public functions test, "when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966). "To satisfy the public functions test, the function at issue must be both traditionally and exclusively governmental." *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002) (citing

1 *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)). TAF is a non-profit entity and there are no facts
 2 in the record indicating that its adoption procedures are governed or controlled by Clark
 3 County. In fact, as I have already explained, the evidence shows that Clark County lacked
 4 control over the adoption services portion of TAF. *See* Shelter Agreement, Clark County's Ex. 1,
 5 ECF No. 428-4; Andersen dep., Clark County's Ex. E, ECF No. 428-4; TAF's Ex. P, ECF No. 477-
 6 16 at 5, 115:17-22 ("Animal Foundation has two distinct operating entities: the sheltering side
 7 and the nonprofit foundation side for adoptions. The terms of this contract do not extend to the
 8 adoption portion of The Animal Foundation. And so we do not -- the County -- tell them what to
 9 do."); Scholten dep., TAF's Ex. S, ECF No. 477-19 at 6, 36:17-25 (stating that the shelter services
 10 and the adoption services do not work together). Further, Borenstein has not shown that TAF's
 11 work adopting out animals is the traditional and exclusive domain of the government. Under the
 12 public functions test, TAF was not acting under color of state law.

13 ***b. State compulsion test***

14 Under the state compulsion test, state action is found "where the state has 'exercised
 15 coercive power or has provided such significant encouragement, either overt or covert, that the
 16 [private actor's] choice must in law be deemed to be that of the State.'" *Johnson*, 113 F.3 at 1119
 17 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982)). Again, the evidence shows that Clark County
 18 does not, in any way, exercise coercive power or provide significant encouragement to TAF's
 19 adoption decisions. The evidence paints the opposite picture: Clark County employees disavow
 20 any control over the adoption services. *See, e.g.*, Andersen dep., TAF's Ex. P, ECF No. 477-16 at 5,
 21 115:21-22 ("And so we do not -- the County -- tell [TAF] what to do."); Zavala dep., Pl.'s Ex. 5,
 22 ECF No. 445-5 at 78, 294:25-295:1-2 ("I don't see -- I don't see us stepping in to -- to tell The
 23 Animal Foundation how their policies or -- or how to change their -- their procedures for that.").
 24 Therefore, TAF does not qualify as a state actor under the state compulsion test.

1 *c. Joint action test*

2 “Under the joint action test, we consider whether ‘the state has so far insinuated itself
3 into a position of interdependence with the private entity that it must be recognized as a joint
4 participant in the challenged activity. This occurs when the state knowingly accepts the
5 benefits derived from unconstitutional behavior.’” *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir.
6 2003) (quoting *Parks Sch. of Bus., Inc., v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995)). Here, as set
7 forth in the TAC, the alleged unlawful seizure came from converting the “temporary, authorized
8 deprivation of Borenstein’s [dog] into a permanent, unlawful deprivation, **through the adoption**
9 **of [Borenstein’s dog.]**” ECF No. 329 at ¶ 272 (emphasis added). Although, in a broad sense,
10 animal adoption services benefit the public, and TAF and Clark County benefited from their
11 contract, Borenstein’s allegation is not enough to confer state action onto TAF. *See Gorenc v. Salt*
12 *River Project Agr. Imp. & Power Dist.*, 869 F.2d 503, 508 (9th Cir. 1989) (explaining that Salt River’s
13 generation of electricity, which the public benefits from, does not confer state action). Under the
14 joint action test, TAF does not qualify as a state actor.

15 *d. Governmental nexus test*

16 The governmental nexus test requires the court to consider “whether there is a
17 sufficiently close nexus between the state and the challenged action of the regulated entity so
18 that the action of the latter may be fairly treated as that of the state itself.” *Jackson v. Metro. Edison*
19 *Co.*, 419 U.S. 345, 352 (1974). When applying this test, the Ninth Circuit looks at factors such as
20 whether “the private organization relies on public funding, whether it is composed mainly of
21 public officials, and whether those public officials ‘dominate decision making of the
22 organization.’” *O’Handley v. Weber*, 62 F.4th 1145, 1157 (9th Cir. 2023) (quoting *Villegas v. Gilroy*
23 *Garlic Festival Ass’n*, 541 F.3d 950, 995 (9th Cir. 2008) (en banc)).

24 The Shelter Agreement provides public funding for TAF shelter operations. *See* ECF No.,
25 428-4 at 12. However, the United States Supreme Court has held that the provision of state
26 funds to a private entity, without more, does not make the state responsible for that entity’s

1 decisions. *Blum*, 457 U.S. at 1011 (“That programs undertaken by the State result in substantial
2 funding of the activities of a private entity is no more persuasive than the fact of regulation of
3 such an entity in demonstrating that the State is responsible for decisions made by the entity in
4 the course of its business.”). Additionally, there are no facts in the record demonstrating that
5 TAF’s adoption services are mainly run by public officials or that any public officials dominated
6 TAF’s decision-making as it relates to the adoption services. In fact, the facts demonstrate the
7 opposite. Although Clark County Animal Control were involved with TAF’s shelter services, the
8 record demonstrates that it did not control TAF’s decisions related to adoptions. *See* Zavala dep.,
9 Pl.’s Ex. 5, ECF No. 482-5 at 77, 292:19–22 (“We -- Animal Control, we’re on -- we’re on the
10 different side of -- of the situation. We deal with the field. We deal with the impoundment. We
11 don’t deal with the adoption portion of it.”); Andersen dep., TAF’s Ex. P, ECF No. 477-16 at 5,
12 115:17–22 (“Animal Foundation has two distinct operating entities: the sheltering side and the
13 nonprofit foundation side for adoptions. The terms of this contract do not extend to the
14 adoption portion of The Animal Foundation. And so we do not -- the County -- tell them what to
15 do.”); *see also* Email from Zavala to TAF, Pl.’s Ex. 1, ECF No. 329-1 at 21 (“I let [Borenstein] know
16 it’s TAF’s decision how long to hold the dog for.”).

17 In his opposition, Borenstein argues that TAF’s shelter services are not separate and
18 distinct from its adoption services. To support his argument, Borenstein points to the following:
19 (1) most of TAF’s inventory of animals available for adoption comes from the government
20 impoundment, (2) the County determines the legal hold on its impoundments, and (3) TAF may
21 not adopt any animal impounded by the County during the legal hold period. ECF No. 488 at 6–
22 7. But none of these facts support finding that TAF is a state actor. Borenstein does not cite to
23 any case law supporting the fact that most of TAF’s inventory comes from the government
24 impoundment creates a sufficiently close nexus between Clark County’s utilization of TAF for
25 impoundments, and TAF’s adoption services to qualify TAF as a state actor.

1 Indeed, Clark County's ability to determine the legal hold on impoundments and to
2 prohibit TAF from adopting out any animals impounded by Clark County during the legal hold
3 period binds TAF regarding its *shelter* services, but not its adoption services. The Shelter
4 Agreement demonstrates that, during the legal hold period, the animals are controlled by TAF's
5 shelter services. Although TAF's shelter services are intertwined with Clark County, TAF's
6 adoption services are not. The legal hold is the mechanism from which the animals move from
7 Clark County's property to TAF's property. During that period, Clark County is deciding how
8 long it will control the animals, not how long TAF will control the animals. Once the legal hold
9 period is over, TAF may adopt the animals out as it sees fit. *See* Andersen dep., TAF's Ex. P, ECF
10 No. 477-16 at 6, 116:8-16 ("While the animal is on a legal hold, it's the property of Clark County.
11 So [TAF] abides by our hold times while it's on a legal hold. When we release the legal hold on
12 it, when the County releases the legal hold, then we have no more claim over that animal, and it's
13 turned over to [TAF], to their adoption foundation side."). Here, the legal hold initially expired
14 on May 22, 2019. TAF extended the hold other ten days, until May 31, 2019.⁵

15 Further, as already noted in this order, the evidence demonstrates that TAF's adoption
16 services are separate and distinct from the shelter services. *See supra* pp. 4-5. Although
17 Borenstein points out that the adoption center and the animal shelter share the same address, *see*
18 ECF No. 488 at 8, the adoption center and the animal shelter operate in two separate buildings.
19 *See* Map, ECF No. 428-4 at 24. Without more, that is insufficient to meet the nexus test. *See*
20 *Lansing v. City of Memphis*, 202 F.3d 821, 831-834 (6th Cir. 2000) (finding, as a matter of law, that
21 plaintiff failed to satisfy the nexus test where a non-profit corporation that operated a music
22 festival on city property, coordinated with government officials, and conferred a substantial
23 economic benefit on its government partner, received public funding, and had public officials on
24 its board.).

25 _____
26 ⁵ Borenstein requested a hold until June 2, 2019. ECF No. 329 at ¶ 125. It is unclear why the hold wasn't
until June 2nd. Nonetheless, May 31, 2019, was well past the 72-hours TAF was required to hold Mana
pursuant to Clark County Code § 10.24.010.

1 Borenstein also argues that TAF and Clark County are sufficiently intertwined because
 2 Clark County requires TAF to (1) vaccinate the animals, (2) make sure they are spayed and
 3 neutered, (3) notify owners of possible euthanasia, and (3) provide statistical reports to the
 4 County, ECF No. 488 at 7–8, and that TAF is bound by two Nevada statutes: Nev. Rev. Stat. §
 5 574.620(4) which requires that TAF “takes into custody pets which have been abandoned,
 6 abused, or neglected and places those pets with new owners” and Nev. Rev. Stat. §
 7 244.359(1)(b) which authorizes the board of county commissioners to regulate the disposal of
 8 all kinds of animals. *Id.* at 9 (citing statutes) (underlining in original). These are all examples of
 9 how Clark County regulates TAF. But Borenstein’s arguments fails because “[t]he mere fact that
 10 a [private actor] is subject to state regulation does not by itself convert its action into that of the
 11 state[.]” *Jackson*, 419 U.S. at 350; *see also Heineke v. Santa Clara Univ.*, 965 F.3d 1009 (9th Cir. 2020)
 12 (declining to find that Santa Clara University was a state actor because state and federal law
 13 coerced the private university to enforce federal and state anti-discrimination laws); *Pasadena*
 14 *Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1172 (9th Cir. 2021) (holding that “the fact that the
 15 government licenses, contracts with, or grants a monopoly to a private entity does not convert
 16 the private entity into a state actor—unless the private entity is performing a traditional,
 17 exclusive public function”).

18 Borenstein argues that the Shelter Agreement states that ownership of animals after the
 19 legal hold period⁶ can be turned over to TAF only if TAF has not exceeded the maximum shelter
 20 occupancy provided in the contract, and that shelter occupancy at the time TAF seized
 21 ownership of Borenstein’s dog is a fact genuinely in dispute in this case that he believes creates a
 22 genuine issue of fact as to whether TAF was a state actor. ECF No. 488 at 7. There are multiple
 23 issues with this argument. First, although the extent of state involvement presents a fact-
 24 specific inquiry (i.e., presents a question of fact), the determination of whether an entity is a
 25

26 ⁶ Mana’s courtesy hold expired on May 22, 2019, and the extension on that hold *expired* on May 31, 2019.
 ECF No. 329 at ¶¶ 106, 132, 137.

1 state actor is a legal—not factual—determination. *See Lopez v. Dep’t of Health Servs.*, 939 F.2d 881,
2 883 (9th Cir. 1991); *Blum*, 457 U.S. at 997 (describing “whether there is state action” as one of
3 “several issues of law” for the court). Borenstein cannot evade summary judgment by claiming
4 the court should have a trial on a factual question he failed to prove—that is, whether TAF was
5 at capacity at the time Borenstein’s dog was adopted on June 1, 2019. Regardless, the evidence
6 shows multiple TAF witnesses saying that in May and into June, TAF was probably at
7 maximum capacity because it was its busiest time of the year. *See* Arceo dep., Pl.s Ex. 4, ECF No
8 445-4 at 36, 130:4–13. Second, even assuming *arguendo* that TAF was not at capacity, Borenstein
9 wholly fails to address that the Shelter Agreement is between *Clark County and TAF*. Borenstein is
10 not a party to the contract and cannot enforce it. *See Klamath Water Users Protective Ass’n v.*
11 *Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), *amended on denial of reh’g*, 203 F.3d 1175 (9th Cir.
12 2000) (“Parties that benefit from a government contract are generally assumed to be incidental
13 beneficiaries, and may not enforce the contract absent a clear intent to the contrary.”).
14 Borenstein therefore cannot attempt to assert some sort of breach of contract between Clark
15 County and TAF in attempt to assert that somehow makes TAF a state actor. Finally, the
16 Shelter Agreement does not demonstrate that TAF was acting as a state actor **as it relates to its**
17 **adoption services**. The complaint alleges that the “unreasonable seizure” came from TAF’s
18 decision to **adopt out** Borenstein’s dog. *See* ECF No. 329 at ¶ 272. Therefore, I must analyze
19 whether TAF’s actions in the adoption of the dog were the product of state action. Although the
20 Shelter Agreement dictates certain regulations TAF must abide by, the agreement, those
21 requirements do not automatically convert TAF into a state actor. *See Jackson*, 419 U.S. at 350; *see*
22 *also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 829, 841 (9th Cir. 1999) (“[G]overnmental
23 compulsion in the form of a generally applicable law, without more, is [not] sufficient to deem a
24 private entity a governmental actor.”); *Rendell-Baker*, 457 U.S. at 833, 841–42, 848 (finding no
25 state action where state regulation required school to draft rules for dismissing employees and
26 comply with “an equal employment opportunity requirement”).

1 For all of the reasons stated, TAF's adoption services are not sufficiently intertwined
 2 with Clark County so as to create a "sufficiently close nexus between the state and the
 3 challenged action of the regulated entity so the action of the latter may be fairly treated as that
 4 of the state itself." *Jackson*, 419 U.S. at 352. Therefore, TAF is not a state actor under the
 5 governmental nexus test.

6 Because TAF is not a state actor under any of the four tests, it was not acting under color
 7 of state law and cannot be held liable for a § 1983 claim. So TAF is entitled to summary judgment
 8 on Borenstein's unreasonable seizure claim.⁷

9 ***2. TAF is entitled to summary judgment on the negligent training, supervision,***
 10 ***and retention claim.***

11 In the TAC, Borenstein alleges that TAF was negligent in the training, supervision, and
 12 retention of its employees in the areas of "safeguarding assets, constitutional rights, the ADA,
 13 the State Discrimination Statutes, the Vulnerable Persons Statute, and other requirements,
 14 which . . . caused . . . harm and injuries to Borenstein." ECF No. 329 at ¶ 340.⁸ In its motion, TAF
 15 argues:

16 Borenstein is unable to provide this Court with any facts indicating TAF
 17 negligently trained or supervised its employees. Rather, TAF took special
 18 precautions when hiring its supervising employees, who at the time of this case
 19 included Carly Scholten at the helm of operations. Ms. Scholten went to the
 20 University of Illinois where she received her Bachelor of Science degree in Animal
 21 Sciences, went on to work at DuPage County animal care and control as an animal
 22 care attendant/humane education intern, worked at an animal shelter in
 23 Barrington, Illinois, worked at the Champaign County Humane Society, and had
 24 been employed with the Animal Foundation commencing in 2009. Moreover,
 TAF's baseline training program includes generalized training known as the
 "Adopters Welcome Philosophy", where TAF employees are trained to "just treat
 everyone with the same respect as everyone." Such a policy inherently contains the
 principals enacted through the ADA, whereby all individuals should be treated
 with the same respect as everyone else.

25 ⁷ Because I find that TAF is not a state actor for purposes of § 1983, I do not reach a decision on the merits
 of any of the other elements of the claim.

26 ⁸ The court acknowledges that, in error, it believed Borenstein to be bringing a negligent hiring claim. A
 review of the complaint makes clear that he does not.

1 ECF No. 477 at 15–16. In his reply, Borenstein argues that the employees at TAF were negligently
 2 trained because:

3 [a]t no time in her approximately ten years with TAF, before [Borenstein’s dog]
 4 was impounded in 2019, did Scholten or any of the people who reported to her
 5 receive any training on the ADA, including service dog and disabled persons
 6 recognition, First Amendment retaliation, Fourth Amendment search and seizure,
 or Fourteenth Amendment due process and equal protection, other than
 discrimination in hiring practices.

7 ECF No. 488 at 14–15.

8 Nevada recognizes the tort of negligent training, supervision, and retention. *See Hall v.*
 9 *SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996). “As is the case in hiring an employee, the employer has a
 10 duty to use reasonable care in the training, supervision, and retention of his or her employees to
 11 make sure that the employees are fit for their positions.” *Id.* “Courts consider whether
 12 antecedent circumstances would ‘give the employer reason to believe that the person, by reason
 13 of some attribute of character or prior conduct, would create an undue risk of harm to others in
 14 carrying out his or her employment responsibilities.’” *Romero v. Nev. Dep’t of Corr.*, 2013 U.S. Dist.
 15 LEXIS 168736, at *59 (D. Nev. Nov. 27, 2013) (quoting *id.*)); *see Okeke v. Biomat USA, Inc.*, 927 F.
 16 Supp. 2d 1021, 1028 (D. Nev. 2013) (“Claims for negligent training and supervision are based
 17 upon the premise that an employer should be liable when it places an employee, who it knows
 18 or should have known behaves wrongfully, in a position in which the employee can harm
 19 someone else.”). “Because the question of whether reasonable care was exercised almost always
 20 involves factual inquiries, it is a matter that must generally be decided by a jury.” *Butler v. Bayer*,
 21 168 P.3d 1055, 1065 (Nev. 2007). In Nevada, the law does not permit the inference that an
 22 employer was negligent in training or supervising simply because its employees acted in a
 23 discriminatory manner. *Reece v. Republic Servs., Inc.*, No. 2011 WL 868386, at *11 (D. Nev. Mar. 10,
 24 2011). Thus, to survive a motion for summary judgment, Borenstein must offer evidence that the
 25 employer violated its duty. *Colquhoun v. BHC Montevista Hospital, Inc.*, 2010 WL 2346607, at *3 (D.
 26 Nev. June 9, 2010) (citing *Burnett v. C.B.A. Security Serv.*, 820 P.2d 750, 752 (Nev. 1991)).

1 Borenstein argues that TAF violated its duty to properly train its employees in various
2 areas of constitutional and statutory law. However, Borenstein does not provide any evidence or
3 authority indicating that these subject matters are required applying the “reasonable duty”
4 standard. Borenstein also fails to cite to any case law that states that public or private entities
5 must provide training to their employees on how not to violate the United States Constitution,
6 much less specific Amendments. Additionally, Borenstein alleges that TAF is negligent because
7 it failed to train its employees on “the ADA, including service dog and disabled persons
8 recognition . . .” ECF No. 488 at 14. Borenstein does not even allege what specific training is
9 required nor what ADA provision requires that sort training. While the ADA and certain CFRs
10 do require certain types of trainings, none are applicable here.⁹ Borenstein does not provide any
11 evidence of an industry standard that says that employees at an animal shelter or adoption
12 foundation are typically trained on these things. *See, e.g., Gleason v. Garda CL West, Inc.*, 2019 WL
13 8226385, at *9 (D. Ariz. Dec. 6, 2019) (“Although Plaintiff claims that Defendant did not train
14 Mr. Holzwordt on safe and proper backing up of vehicles, yielding to pedestrians, and not
15 parking in handicapped access aisles, Plaintiff fails to identify any regulation or industry-wide
16 standard this alleged lack of training fails to meet.”). Borenstein also does not allege facts that
17 would allow a reasonable jury to believe that the antecedent circumstances would “giv[e] the
18 employer reason to believe that the person, by reason of some attribute of character or prior
19 conduct, would create an undue risk of harm to others in carrying out his or her employment
20 responsibilities.” *Hall*, 930 P.2d at 99.

21 The evidence demonstrates that TAF has a baseline training program that sufficiently
22 ensures that all individuals visiting TAF are treated with respect. *See* Arceo dep., TAF’s Ex. K,

23 ⁹ *See, e.g.*, 28 C.F.R. Pt. 36 (ADA mandates that private entities that offer exams or courses related to
24 applications, licensing, certification, or credentialing for secondary or postsecondary education,
25 professional, or trade purposes are accessible to persons with disabilities; 42 U.S.C. § 12112 (ADA
26 prohibiting discrimination in job training, requiring reasonable accommodations for employees with
disabilities); 49 C.F.R. Pt. 37, App. D (discussing that private entities involved in transportation services
are required to train their employees on ADA compliance to ensure effective service delivery and
requirement standards for accessibility vehicles).

1 ECF No. 479-11 at 4, 99:3–14. Because there is neither evidence nor authority requiring TAF to
2 do more than having this baseline training program, Borenstein fails to meet his burden in
3 demonstrating that the employer violated its duty. So TAF is entitled to summary judgment on
4 this claim.

5 **IV. Conclusion**

6 IT IS THEREFORE ORDERED that Clark County's motion for summary judgment
7 [ECF Nos. 428 (sealed), 455 (unsealed)] is GRANTED, so the cross claims are also dismissed.
8 The Clerk of Court is instructed to enter judgment in favor of Clark County.

9 IT IS FURTHER ORDERED that The Animal Foundation's motion for partial summary
10 judgment [ECF Nos. 477 (unsealed), 479 (sealed)] is GRANTED. The remaining claims
11 against TAF are as follows:

- 12 • Borenstein's claim against The Animal Foundation for violations of § 12182 of the ADA
13 (eighth cause of action),
- 14 • Borenstein's claim against The Animal Foundation for retaliation in violation of § 12203
15 of the ADA (ninth cause of action),
- 16 • Borenstein's claim against The Animal Foundation for violations of public
17 accommodation under Nev. Rev. Stat. § 651.070 (eleventh cause of action).

18 IT IS FURTHER ORDERED that ECF No. 459 is STRICKEN. The Clerk of Court is
19 kindly instructed to reinstate and deny without prejudice ECF No. 432 as it was erroneously
20 stricken in my prior order.

21 IT IS FURTHER ORDERED that Borenstein's motion to seal at [ECF No. 468] is
22 GRANTED.

23 Dated: May 9, 2025

24 
25 Cristina D. Silva
26 United States District Judge